RECORD AND BRIEFS

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In the Supreme Court of the United States

REBECCA FRIEDRICHS, ET AL.,
Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF FORMER CALIFORNIA SENATE MAJORITY LEADER GLORIA ROMERO, CALIFORNIA CENTER FOR PARENT EMPOWERMENT, GWEN SAMUEL, NATIONAL PARENTS UNION, CONNECTICUT PARENTS UNION, MONA DAVIDS, SAM PIROZZOLO, NEW YORK CITY PARENTS UNION, KELLEY WILLIAMS-BOLAR. HAMLET GARCIA, RISHAWN BIDDLE, DROPOUT NATION, DMITRI MEHLHORN, ERIKA SANZI, JULIE COLLIER, BONNIE O'NEIL, AND LAURA FERGUSON AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

Amici curiae[1] are parents, former public officials, and the organizations they lead, who for decades have advocated for reforming our public education system. They have battled for teacher accountability; merit-based teacher pay, assignment, and retention; greater investment in talented teachers for failing schools; closing the achievement gap for poor and minority students; laws that permit students to change schools if their geographically assigned school fails student-outcome benchmarks; and laws empowering parents to choose the best schools for their children. With well-financed collective bargaining presentations and political campaigns, public teacher unions have fought *amici curiae* every step of the way. *Amici curiae* present a unique perspective on the importance of the issues for which public teacher unions advocate—within and outside collective bargaining—and on how legally mandated subsidies to union campaigns tip the public debate in the unions' favor.

Agency fees and the obstacles they pose to public school reform are not partisan political issues for *amici*; they are about saving children from failing

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[1] The parties have consented in writing to the filing of this brief and copies of their letters of consent are on file with the Clerk's office. Counsel for *amici* authored this brief in its entirety. No party to this case or its counsel authored any part of this brief or contributed money that was intended to fund the preparation or submission of this brief. No person, other than *amici*, their members, and their counsel, contributed money that was intended to fund the preparation or submission of this brief.

schools. *Amici* include[2] Gloria Romero, the former Democratic Majority Leader of the California State Senate and founder of the California Center for Parent Empowerment, who has led state- and nationwide efforts for parent and student empowerment, public school reform, and school choice. Gwen Samuel founded the Connecticut Parents Union, Mona Davids founded the New York City Parents Union, and along with others, they co-founded the National Parents Union. These organizations serve as a parent voice, particularly minority and economically disadvantaged parents, for public school reform. Frustrated with the quality of their children's schools in California, Bonnie O'Neil and Julie Collier founded AGAPE ("A Group of Assisting Parents for Education") and the Parents Advocate League, respectively, to urge change on school boards and other politicians. Together, the *amici* organizations represent tens of thousands of parents concerned about the future of our public school system.

RiShawn Biddle founded *Dropout Nation*, an online publication dedicated to chronicling the challenges facing our Nation's schools and seeking reform. Erika Sanzi, Sam Pirozzolo, Dmitri Mehlhorn, and Laura Ferguson are likewise long-time advocates of and authors writing on educational reform in their communities.

Amici have made dramatic personal sacrifices to secure the opportunity of a competent education for their children. After years of watching her daugh-

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[2] A full list of the signatories to this brief is set forth in the Appendix.

ters' Akron, Ohio school decline, Kelley Williams-Bolar enrolled her children at another public school using her father's address. The school district hired a private investigator to videotape Ms. Williams-Bolar driving her kids to school. She was then prosecuted and jailed for breaking that public school system's geographic assignment rules.[3] Governor John Kasich granted her clemency. When Hamlet Garcia enrolled his young daughter outside the crumbling school assigned by the State, he too was prosecuted.[4]

Ms. Williams-Bolar, Mr. Garcia and many others would rather seek changes in the laws consigning their children to failing schools than break them. And all *amici* have battled to counterbalance the influence of the well-financed teachers' unions in the education policy debate. Because of the compulsory agency fees fueling union efforts, *amici* are not in a fair fight.

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[3] *See* Andrea Canning & Leezel Tanglao, *Ohio Mom Kelley Williams-Bolar Jailed for Sending Kids to Better School District*, abcNews.com (Jan. 26, 2011), http://abcnews.go.com/US/ohio-mom-jailed-sending-kids-school-district/story?id=12763654.

[4] *See* Dan Clark, *Philadelphia Man Sentenced to Pay More than $10000 to Lower Moreland School District*, The Times Herald (Jan. 28, 2014), http://www.timesherald.com/social-affairs/20140128/philadelphia-man-sentenced-to-pay-more-than-10000-to-lower-moreland-school-district.

SUMMARY OF ARGUMENT

The question before the Court is whether teachers may be forced by law to fund union advocacy on the most crucial challenges facing our Nation's public schools. Workplace rules and policies sought by teachers' unions strike at the heart of how we educate our children. Instead of supporting investment in quality teachers and the schools most in need, unions attack meaningful review of teacher performance, demand assignment and retention of teachers based on seniority rather than merit and need, and insist that teachers be compensated without regard to what, where, or how well they teach.

These policies—all pursued in union collective bargaining—are not the "prosaic" matters of wages and lunch breaks often found with a private employer. *Contra Harris v. Quinn*, 134 S. Ct. 2618, 2655 (2014) (Kagan, J., dissenting). These policies are instead primary reasons for our crumbling public schools in disadvantaged neighborhoods, and they are what have motivated *amici* to spend decades fighting in the public forum. They have substantially contributed to one of the greatest civil rights crises of our time: Sentencing disadvantaged youth—often from poor and minority households—to failing and irremediable schools.

Surely public employee unions may seek to persuade government officials of their policy preferences, both through collective bargaining and otherwise. But because of the First Amendment's prohibition on compelled speech, unions cannot force by law those who disagree to fund that advocacy. Many teachers subject to compulsory agency fees resent in-

heriting students from the incompetent, albeit long-tenured, teachers in the last grade. These teachers also understand that failing schools require higher compensation to attract the special talent necessary to turn them around. Forcing them to confess a contrary view on these contentious matters of public policy violently tramples their First Amendment rights.

Students are the particularly helpless casualties of this constitutional violation. Agency fees dramatically "tilt public debate" in the unions' "preferred direction." *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2671 (2011). Laws forcing citizens to subsidize other private parties' advocacy—amounting to hundreds of millions of dollars in revenue—have built a deafening megaphone for the unions' policy preferences. The compulsory portion of agency fees provide for elaborate collective bargaining presentations against reforms that would begin to save students from failing schools and free union funds for lobbying and contributions to political candidates who favor union policies. Any elected public official failing to toe the union line faces a mountain of union-funded opposition.

No other voice in the public education debate has the force of law as its fundraiser. The California scheme plainly violates the First Amendment.

ARGUMENT

I. UNION COLLECTIVE BARGAINING DEMANDS GO TO THE HEART OF EDUCATING OUR CHILDREN AND ARE POLITICAL SPEECH

More than 60 years ago, this Court declared "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). But *amici* see children nationwide—at times, their own children—denied "the opportunity of an education," at least one of any reasonable quality. That is due in no small part to the agency fees at issue in this litigation, stockpiles of cash that enable unions to dominate the public education policy debate and to capture politicians. Necessary and critical reforms are thwarted by public education unions as part of collectively bargained contracts to the significant and long-lasting detriment of public school students.

Amici believe that public education unions, and unions more generally, play an important role in helping protect employees from heavy-handed employers. Indeed, one *amica* has sponsored and voted for numerous legislative measures to protect union collective bargaining rights. *Amici* object, however, to the outsized role teachers' unions play in education policymaking, which results from the commanding financial advantage granted by laws forcing every teacher to financially support every union policy position advanced in collective bargaining, whether the teacher agrees or not. The policies unions now seek are far afield from the bread and butter of

workplace conditions, and those policies have prevented school districts nationwide from providing quality education to their students, particularly to minority students and those living in poverty.

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court recognized that compelling employees to "help finance the union as a collective bargaining agent might well be thought" "to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit." *Id.* at 222.

While *Abood* held that the First Amendment prohibits states from requiring public school teachers to "contribute to the support of an ideological cause" they "may oppose as a condition of holding a job as a public school teacher," the Court created an exception. *Id.* at 235. Lest public employees free ride on the benefits obtained through collective bargaining, the Court held, government may force contributions to fund collective bargaining. *Id.* at 220–21.

The *Abood* distinction between a union's political lobbying and campaign activities, on the one hand, and collective bargaining, on the other, is unsustainable, as time and experience have shown. *All* such activities, including collective bargaining for public employees, are inherently political, if only because they affect the allocation of scarce public resources. *See Harris*, 131 S. Ct. at 2632–33 ("[I]n the public sector, both collective-bargaining and political advocacy and lobbying are directed at the government."); *see also Knox v. SEIU*, 132 S. Ct. 2277, 2289 (2012) (recognizing that a "public-sector union takes many

positions during collective-bargaining that have powerful political and civic consequences").

Public funding aside, the workplace rules and conditions sought in collective bargaining change the lives of teachers and their students. *Amici*'s decades of experience in seeking public school reform confirms that *both* the unions' collective bargaining *and* other political activities reach matters of profound public importance. Three staples of union collective bargaining illustrate the point: (1) compensating teachers based solely on seniority rather than their field of study, the school's need, or performance; (2) elaborate procedures that effectively prevent the removal or remediation of ineffective teachers; and (3) assignment and layoff policies mechanically based on protecting the senior, rather than the able.

Unions have thwarted at every turn proposed reforms centered around these issues. While these issues fall squarely within the scope of the unions' representation,[5] they are issues of paramount public interest deserving of the strongest First Amendment protections.

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[5] In California, state law authorizes public education unions to bargain over wages, the procedures to be used in evaluating employees, and seniority preferences in transferring and reassigning teachers. *See* Cal. Gov't Code § 3543.2(a)(1) (2010 & Supp. 2015).

A. Unions Demand Teacher Compensation Based on Seniority, Not School Need, Field of Study, or Performance

Collective bargaining takes first aim at teacher compensation policy. Virtually every collective bargaining agreement has adopted a "single salary schedule"—a uniform pay schedule based primarily on the number of years teaching and the teacher's level of education. *See* Terry M. Moe, *Special Interest: Teacher's Unions and American Public Schools* 179–80 (Brookings Inst. Press ed. 2011). The single salary schedule "is a formula for stagnation. It guarantees that good, mediocre, and bad teachers are all paid the same." *Id.* at 180. Yet the National Education Association ("NEA") considers any "system of compensation based on an evaluation of an education employee's performance" to be "inappropriate." Nat'l Educ. Ass'n, *2015 Handbook* at 291, http://goo.gl/EjpDcq ("*2015 Handbook*").

Amici believe that compensation based on need and merit is essential to turning around failing schools in disadvantaged areas. Teaching in a struggling school is difficult, and districts should pay talented and energetic teachers premiums to work there. The studies are clear: When all teachers of commensurate seniority and education are compensated exactly the same, regardless of the schools or fields in which they teach, teachers are less likely to seek employment in schools with difficult working conditions and in hard-to-staff fields, such as special education, mathematics, and science. *See* Michael Podgursky, *Reforming Educator Compensation* 5–7 (George W. Bush Institute ed. Feb. 2014),

http://www.bushcenter.org/documents/2014/02/12/reforming-educator-compensation.

Seniority-based pay causes teacher flight from disadvantaged schools. "Because the current system includes no monetary rewards directly tied to effectiveness, many effective teachers seek more 'compensation' through better working conditions, often choosing to leave schools with a high population of disadvantaged students and challenging teaching conditions for schools serving more advantaged students." Joshua Barnett & Gary W. Ritter, *When Merit Pay Is Worth Pursuing*, Educational Leadership, http://www.ascd.org/publications/educational-leadership/oct08/vol66/num02/When-Merit-Pay-Is-Worth-Pursuing.aspx (last visited Sept. 10, 2015).

Notwithstanding this dilemma, union opposition to investing particularly in failing schools with better paid teachers is unwavering. The NEA, for instance, actively "opposes providing additional compensation to attract and/or retain education employees in hard-to-recruit positions." *2015 Handbook* at 291. *Amici* have struggled against this union intransigence as they plead with their school boards to invest in failing schools.[6]

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[6] More generally, merit-based compensation would attract more talented teachers across a school system and encourage existing teachers to perform at a higher level. *See, e.g.*, Podgursky, *supra*, at 7 (a performance-based system would have a "selection effect" and would draw "teachers into the workforce who are relatively more effective at meeting . . . performance targets" in the classroom); *cf.* Caroline M. Hoxby & Andrew Leigh, *Pulled Away or Pushed Out: Explaining the Decline of Teacher Aptitude in the United States*, 94 Am. Econ.

B. Union-Advocated Work Rules Shelter Ineffective and Failing Teachers from Remediation and Dismissal

Public education unions inevitably seek collective-bargaining-agreement terms that shield ineffective teachers from correction, remediation, or dismissal. The agreements require school districts to overcome a series of procedural hurdles—reprimands, meetings, and notices—before they can discipline or remove ineffective teachers. *See, e.g.*, Agreement between L.A. Unified Sch. Dist. Bd. of Educ. and United Teachers L.A. (for 2014-2017) ("L.A. Agreement"), art. X, § 11.0. This is not simply a typical employee struggle to lessen management supervision: *Amici* have been fighting against these rules to ensure that students receive good teachers and their education is not stunted.

Unions have tried through intense lobbying campaigns—which California law permits to be funded with agency fees, *see* Cal. Gov't Code § 3546(a)–(b) (2010)—to codify into statute what they have obtained in collective bargaining agreements. *See, e.g.*, Cal. Educ. Code §§ 44934, 44938, 44944 (2006 & Supp. 2015) (requiring elaborate written notices, hearings, and other hurdles before ordering even remediation, much less suspension or dismissal). Lower courts have recognized that this union-advocated, "tortuous" maze of rules can "cause districts in many cases to be very reluctant to even commence" disciplining—much less dismissing—an ineffective teach-

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Rev. 236 (May 2004) (concluding that unionized pay resulted in high-aptitude teachers leaving the school systems).

er. *Vergara v. California*, No. BC484642, slip op. at 11, 12 (Cal. Super. Ct. Aug. 27, 2014) (Appendix ("App.") 18a); *see also* Moe, *supra*, at 184 ("These procedures tend to be complicated, involve multiple steps and appeals—to arbitrators, for example, or the courts—and entail a great deal of time and expense for any district leader who tries to dismiss someone."). In California, for instance, "it could take anywhere from two to almost ten years and cost $50,000 to $450,000 or more" to dismiss an ineffective teacher. *Vergara*, slip op. at 11, App. 18a. Even when administrators "try to formally terminate teachers, the data show that they face a very limited likelihood of success." Jessica Levin, Jennifer Mulhern & Joan Schunck, *Unintended Consequences: The Case for Reforming Staffing Rules in Urban Teachers Union Contracts* 5 (The New Teacher Project ed. 2005), http://tntp.org/publications/view/unintended-consequences-the-case-for-reforming-staffing-rules.

Given the time and expense necessary to investigate and prosecute these cases, administrators often choose instead to look the other way, leaving underperforming teachers in place or to transfer from school to school. This transfer phenomenon has garnered its own label: "the Dance of the Lemons." *See Vergara*, slip op. at 15, App. 22a; *see also* Levin, Mulhern & Schunck, *supra*, at 15–17. One school's solution, unfortunately, becomes another school's problem.

Surely these rules make administrators' jobs more difficult. But the inability to remediate an under-performing teacher is not a simple employment

problem, nor an aspect of "labor peace." *See Abood*, 413 U.S. at 220–21. These employees are teaching children, not building toaster ovens. And when teachers fail, the effects on students—and the Nation—are profound. One study concluded that "[r]eplacing a teacher whose [value-added] is in the bottom 5 percent with an *average* teacher would increase the present value of students' lifetime income" by more than $250,000 for the average classroom in the study's sample. Raj Chetty, John N. Friedman & Jonah E. Rockoff, *NBER Working Paper Series, The Long-Term Impacts of Teachers: Teacher Value-Added and Student Outcomes in Adulthood* 5 (2011), http://www.nber.org/papers/w17699 (emphasis added). In a California case, the court found that "a single year in a classroom with a grossly ineffective teacher costs students $1.4 million in lifetime earnings per classroom." *Vergara*, slip op. at 7, App. 14a; *see also id.* (citing expert testimony that students in the L.A. Unified School District "who are taught by a teacher in the bottom 5% of competence lose 9.54 months of learning in a single year compared to students with average teachers").

For failing schools, these rules make the turnaround all the more difficult. Poorly performing teachers crowd out highly motivated teachers. For those already there, poorly performing teachers drag down their high-performing colleagues, who must try to repair the damage done in the last grade.

Union-advocated disciplinary schemes are hardly channeling the preferences of the teachers they represent, contrary to claims that teachers who do not pay agency fees enjoy the benefits of collective bar-

gaining while bearing none of the costs. *See Abood*, 431 U.S. at 221–22. In one national survey, for example, approximately 78 percent of the teachers surveyed indicated that at least a few "teachers in [their] building fail to do a good job and are simply going through the motions." Steve Farkas et al., *Stand by Me: What Teachers Really Think About Unions, Merit Pay and Other Professional Matters* 20 (Public Agenda ed., 2003), http://goo.gl/SdSQFH. In the same survey, 53 percent said the policies should be changed "to make it far easier to remove bad teachers." *Id.*; *see also Vergara*, slip op. 12, App. 20a (citing evidence "that teachers themselves do not want grossly ineffective colleagues in the classroom").[7]

Yet these practices continue unabated. This is a crucial matter of public policy for *amici*, as it should be for all Americans. These rules prioritize the job security of ineffective teachers *over* the education and well-being of students. Because of agency fees,

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[7] Administrators agree. In a national survey of principals and superintendents who were asked to rank various reform ideas to improve public schools, both of these groups rated as number one reforms "making it much easier to remove bad teachers." Steve Farkas, Jean Johnson, Ann Duffett, & Tony Foleno, with Patrick Foley, *Trying to Stay Ahead of the Game: Superintendents and Principals Talk about School Leadership* 26–28 (New Public Agenda ed., 2001), http://www.publicagenda.org/files/ahead_of_the_game.pdf.

disagreeing teachers seeking a focus on quality must fund the union campaign for such rules, and one side of the debate maintains a commanding advantage in resources.

C. Union Rules Tie Teacher Assignments, Transfers, and Reductions in Force to Seniority, Rather than Merit or the Needs of Students

Amici consistently plead with administrators and school boards for injections of energy and resources into at-risk schools. But when it comes to personnel, leaders cannot act to address critical needs or to assemble a team of the very best. Because of collective bargaining terms, only one thing really matters: Seniority.

Take the last decade of tight public budgets and the resulting reductions in force. Almost invariably, contract provisions require district-wide reductions in force to be imposed principally on the basis of teacher seniority. *See* L.A. Agreement, art. XIII, § 3.0(b) ("The order of termination within a teaching or service field . . . shall be based on seniority within status . . . ."). The NEA's "basic contract standards" include (among other things): "[l]ayoff and recall based only on seniority as bargaining unit members, licensure/certification, and . . . affirmative action." *2015 Handbook* at 289. *See also* Dan Goldhaber & Roddy Theobald, *Assessing the Determinants and Implications of Teacher Layoffs* 3 (Nat'l Ctr. For Analysis of Longitudinal Data in Educ. Research, Working Paper 55, 2010), http://www.urban.org/research/publication/assessing-determinants-and-

implications-teacher-layoffs ("[I]n the overwhelming majority of [collective bargaining] agreements, seniority is the determining factor in which teachers are laid off first with 'last hired, first fired' provisions.").

Thus, if the school district gets to keep talented teachers, it is mostly by accident. And the layoff rules result in fewer teachers. "Because the most junior staff tend to be the lowest paid, districts must lay off *more* people" to satisfy necessary budget cuts. Christine Sepe & Marguerite Roza, *The Disproportionate Impact of Seniority-Based Layoffs on Poor, Minority Students*, CRPE 1 (May 10, 2010), http://www.crpe.org/sites/default/files/rr_crpe_layoffs_rr9_may10_0.pdf (emphasis added). Courts also have been confounded by these rules and their upside-down results:

> No matter how gifted the junior teacher, and no matter how grossly ineffective the senior teacher, the junior gifted one, who all parties agree is creating a positive atmosphere for his/her students, is separated from [the students] and a senior grossly ineffective one, who all parties agree is harming the students entrusted to him/her, is left in place.

Vergara, slip op. at 13, App. 21a.

Even without reductions in force, unions seek rules that tie the hands of administrators, preventing them from sending talented teachers to where they are most needed. Instead, union-advocated rules require assignments and transfers at the preference of the senior teacher. *See, e.g.*, L.A. Agreement, art. XI, § 6.c ("[W]hen there is an over-

teachered condition, the teacher with the least District seniority . . . will be displaced . . . ."); Agreement between Oakland Unified Sch. Dist. Bd. of Educ. and Oakland Educ. Ass'n (for 2014-2017), art. 22.7 ("[S]eniority . . . shall be given preference in granting a transfer request.").

Voluntary transfers on the basis of seniority often have negative effects on the transferee school. Because of the seniority rules in collective bargaining agreements, a vacant position often goes to the most senior applicant without regard to the needs of the particular school or its students. *See, e.g.*, Levin, Mulhern & Schunck, *supra*, at 5, 8–9. This has left the teacher staffing process focused not on spiriting the most talented teachers to the schools in most need of help, or filling an intense subject matter need, but rather on "satisfying union rules." *Id.* at 14.

At the same time, when *involuntary* transfers (also known as "excessed teachers") are necessitated to fully staff schools, teachers are shuffled to these schools on the basis of arbitrary union rules. Far from administrators selecting the best and brightest, the transferee school "must hire [the transferred teacher] without a selection process." Levin, Mulhern & Schunck, *supra*, at 9. The result again is that these schools are forced to hire large numbers of teachers they may not want or who may not fit their particular needs. *Id.* at 12.

The students who are most affected by these policies are the ones least able to bear them: minority and low-income students. For example, following a ten-week bench trial, a California court concluded

that the lack of effective dismissal procedures and seniority-based reductions in force in California "affect high-poverty and minority students disproportionately," which, in turn "greatly affects the stability of the learning process to the detriment of such students." *Vergara*, slip op. at 15, App. 22a.[8]

It is hard for *amici* to hold school boards and administrators accountable when union rules prohibit them from investing human capital in the schools that need it most. *Amici* know that the fate of struggling schools depends on changing union-advocated rules on assignments and reductions in force. Yet every time *amici* try to bring about that change, they face an insurmountable wall of union opposition, financed by agency fees. Striking down *Abood* and restoring enforcement of the First Amendment will

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[8] *Vergara* is not the only suit to challenge such practices. Students and parents in New York (including *amici* Mona Davids and Sam Pirozzolo) have brought suit, alleging that New York's tenure, seniority and layoff rules infringe students' constitutional right to a quality public education. *See Davids v. New York*, Index No. 101105/14 (N.Y. Sup. Ct. am. compl. filed July 25, 2014). The *Davids* complaint is well-founded, as evidenced by Governor Cuomo's recent report, *The State of New York's Failing Schools – 2015 Report*. As of 2014, "only 35.8 percent of [third through eighth grade] students were proficient in math and 31.4 percent were proficient in [English language arts]," yet 99 percent of New York's teachers were rated "highly effective and effective" or "developing" for the 2013-2014 school year. Office of Governor Andrew M. Cuomo, *The State of New York's Failing Schools – 2015 Report* 6–7, http://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYSFailingSchoolsReport.pdf. The Governor's report asks the obvious question: "How can so many of our teachers be succeeding when so many of our students are struggling?" *Id.* at 7.

give *amici*, and the teachers who share their views, a fair chance to persuade.

II. THE FIRST AMENDMENT BARS THE GOVERNMENT FROM FORCING DISSENTING TEACHERS TO FUND UNION ADVOCACY AND THEREBY TO TILT THE PUBLIC DEBATE AGAINST THOSE TEACHERS, PARENTS, AND STUDENTS

With a war chest born of legally coerced contributions, the public sector unions are winning their desired outcomes on these and other education policy issues.

The effect of these policies on underprivileged students is dramatic and severe. Educational quality loses to tenure protection. Talented young teachers are run out by the long-serving, even if lethargic. Inner-city schools are not staffed according to need, but to the accidents of the unions' preferred workplace rules. What prevails is a travesty: Schools that children must attend because of their home address, but that administrators cannot improve. The fruits of forced subsidies to union advocacy—the policies and rules won within and outside collective bargaining—tie the hands of parents and students seeking reform and change. And the least advantaged of our youth cycle from school yard to prison yard.

The irony and the tragedy is that those least able to financially compete are on the other side of the unions' public policy campaigns, subsidized by coerced teacher contributions. There is no government-compelled fund for economically disadvantaged parents to communicate their views and arguments. Instead, they are left to raise their hands in school

board meetings, while the unions make manicured presentations in collective bargaining negotiations and crush politicians who dare to act on parent pleas with political advertisements and union-financed opponents. Had they the money to take these unions on, these parents might move themselves and their children to better school districts or enroll in private schools. Agency fees involve *the government* forcing *teachers* to take one side in a public policy debate against those least able to respond.

And so, faced with this daunting challenge to the civil right to a quality education, *amici* have taken the most dramatic steps to save their children. Ms. Williams-Bolar and Mr. Garcia were prosecuted for removing their children from the school to which the State assigned them and enrolling them in another. They did not undertake such legal peril lightly, but rather out of desperation. If they and others must send their children to schools tethered to their home address, they should at least have a fair chance to convince that district's political leaders to adopt policies that will improve their children's education. The imbalanced public policy debate caused by agency fees is hardly a fair chance.

The First Amendment consistently has prohibited the government from forcing citizens to subsidize speech with which they disagree. *See, e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001). Those defending the *Abood* framework say that union collective bargaining is different and deserves a rule of its own. They contend that the government has "wider constitutional latitude . . . [to adopt measures limiting expression] when it is act-

ing as employer than as sovereign." *Harris*, 134 S. Ct. at 2653 (Kagan, J., dissenting). And of course that abstraction can be correct in certain circumstances. Undoubtedly, the government can restrict its employees from making loud speeches in common work areas about world affairs, so that fellow employees can efficiently perform the government's work. *See Connick v. Meyers*, 461 U.S. 138, 150–52 (1983). Just as clearly, the government may force employees to speak in favor of *the government's viewpoint* in certain settings, at least if they wish to remain employed. Consider the Justice Department lawyer who refuses to argue in favor of the position of the United States.

But compelling a government employee to subsidize a private organization's—here a labor union's—advocacy *to the government* on what *the government should do* is qualitatively different than the above examples. This is not hiring employees to give voice to government speech, which is surely a different constitutional matter. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005) (distinguishing between subsidies of government speech and the speech "*of an entity other than the government itself*") (emphasis added). Nor is it restricting speech to "maintain proper discipline" in the workplace and to bolster employee "efficiency." *Connick*, 461 U.S. at 151–52 (citation and internal punctuation omitted). This is instead the government surveying private participants in a public policy debate, choosing one, and then forcing its employees to give their own money to that private party. *See Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring) ("Compelled support

of a private association is fundamentally different from compelled support of government."). *Amici*'s efforts to urge public school reform demonstrates the constitutional difference. The parents and organizations now before the Court are the ones who must argue against another private party opponent that enjoys a decisive financial advantage, coerced from teachers who in fact agree with those parents.

The First Amendment has always guarded against government compelled speech grossly distorting the marketplace of ideas. *See, e.g.*, *Sorrell*, 131 S. Ct. at 2671–72 ("[A] State's failure to persuade does not allow it to hamstring the opposition. The State may not burden the speech of others in order to tilt public debate in a preferred direction."); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. . . . *Government action* that stifles speech on account of its message, or *that requires the utterance of a particular message favored by the Government, contravenes this essential right.*") (emphasis added); *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) ("[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented."). Reversing the court below and prohibiting mandated subsidies of labor union speech is essential to a coherent and consistent First Amendment.

CONCLUSION

Amici curiae respectfully urge the Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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SEPTEMBER 11, 2015

APPENDIX

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Opinion of the Superior Court of the State of California, County of Los Angeles, in *Vergara v. State of California*, No. BC484642 (decided Aug. 27, 2014) 6a

Gloria Romero served in the California State Senate from 2001 to 2010, including as Democratic Majority Leader from 2005 to 2008. She was the first woman to hold that leadership position. She also served as Chairwoman of the Education Committee from 2008-2010. During her time in the California Senate, Ms. Romero wrote the 2010 Open Enrollment Act, which permits parents of children in the 1,000 most chronically underperforming schools to transfer their children to higher-performing schools. Ms. Romero founded and currently heads the California Center for Parent Empowerment and leads the California chapter of Democrats for Education Reform.

California Center for Parent Empowerment is a nonprofit organization established to promote awareness of the ways in which public school parents can utilize California's Parent Empowerment Act of 2010. It holds workshops to educate parents and assist those who wish to transfer their children to a higher-performing school. The Center represented over 300 parents in bringing about the first transformation in Orange County of a chronically failing school, Palm Lane Elementary School.

Gwen Samuel is the President and founder of the Connecticut Parents Union and a co-founder of the National Parents Union. Ms. Samuel advocated for the enactment of Connecticut's "Parent Trigger" law, which allows parents to make recommendations to improve low-performing schools through participation in School Governance Councils. She also successfully led efforts to enact House Bill 6677, signed into law in 2013, which ended the felony

arrest of Connecticut parents who enroll their children in schools outside of their zip code. Ms. Samuel is the mother of two Meriden, Connecticut public school students.

National Parents Union, founded by Gwen Samuel, Mona Davids, and Kelley Bolar-Williams, among other parents, is an organization that supports parents in their effort to select the school they believe is best for their child's education. The organization seeks to ensure that every child has equal access to a safe and high quality education enabling parents to play a key role in turning around failing schools, increasing school choice, and eliminating school residency laws.

Connecticut Parents Union, founded by Gwen Samuel, is a membership organization that provides Connecticut parents, guardians, and families with legal and other resources to advocate for their children's education.

Miamona "Mona" Davids is the President and founder of the New York City Parents Union. She is also a co-founder of the National Parents Union. Ms. Davids is a plaintiff in *Davids v. State of New York*, Index No. 101105/2014 (N.Y. Sup. Ct.), which alleges that certain New York statutes governing tenure, seniority, discipline, evaluations, and layoffs of public school teachers infringe the constitutional right of students to a quality public school education. Ms. Davids is the mother of two New York City public school students.

Sam Pirozzolo is the Vice President of the New York City Parents Union and former President of the

Community Education Council for District 31, which advises the New York City Chancellor of Education on education policy. Mr. Pirozzolo is also a plaintiff in *Davids v. State of New York*, Index No. 101105/2014 (N.Y. Sup. Ct.), and the parent of two New York City public school students.

New York City Parents Union, founded by Mona Davids, advocates for students' right to a safe, high-quality public school education and counts thousands of New York City parents as members.

Kelley Williams-Bolar advocates for parents' right to send their children to better public schools outside of their school district. She is a co-founder of the National Parents Union. She received media attention in 2011, when she was arrested and convicted of criminal charges for using her father's address to send her two daughters to school in a safer, more affluent school district.

Hamlet Garcia advocates for the de-criminalization of laws that bar parents from sending their children to schools outside their assigned district. He was arrested in Pennsylvania on felony charges for using his father-in-law's address to send his five-year old daughter to school in a safer, more affluent school district. He faced up to seven years' imprisonment. Mr. Garcia ultimately pled guilty to a lesser charge.

RiShawn Biddle is the Editor and Publisher of *Dropout Nation*, which is dedicated to covering and urging public school reform. He is also a father, an advisory board member of the Connecticut Parents

Union, and consultant to the Black Alliance for Educational Options.

Dropout Nation, first developed by RiShawn Biddle, is an online outlet covering and commenting on American public education and school reform. It focuses on issues that contribute to the crisis of low educational achievement that leads to children dropping out of school. Dropout Nation's mission is to help transform public education so that all children attain the high-quality education they need and deserve.

Dmitri Mehlhorn is a co-founder and former Chief Operating Officer of StudentsFirst, a nonprofit organization for educational reform. He is a parent and has authored articles for several organizations and publications, including the *Fordham Law Review*, American Enterprise Institute, and Dropout Nation.

Erika Sanzi is a former public school teacher and a former member of teachers' unions in Massachusetts and California. She consults and writes about school reform for *Education Post*, a non-partisan communications organization dedicated to building support for student-focused improvements in public education. Ms. Sanzi is the mother of three school-aged sons.

Julie Collier is the founder and Executive Director of Parents Advocate League, a nonprofit organization that promotes student-focused education policy and school choice. She is a parent and a former teacher.

Bonnie O'Neil is a co-founder of the California-based A.G.A.P.E. organization, which is "A Group (of) Assisting Parents (for) Education." Ms. O'Neil is a mother and grandmother. She previously founded a cooperative pre-school and was its President for four years.

Laura Ferguson leads the South Orange County Coalition for Education Rejuvenation, which advocates for school choice and is currently petitioning for the establishment of a charter school. She is a volunteer member of California Assemblymember Bill Brough's Education Advisory Committee.

SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF LOS ANGELES

BEATRIZ VERGARA, a minor, by Alicia Martinez, as her guardian ad litem, *et al*,	)	Case No.: BC484642
Plaintiffs,	)	JUDGMENT
vs .	)	Dept. 58
STATE OF CALIFORNIA, *et al*,	)	Judge Rolf M. Treu
Defendants	)	
CALIFORNIA TEACHERS ASSOCIATION, *et al*,	)	
Intervenors	)	

FILED
Superior Court of California
County of Los Angeles

AUG 27 2014

Sherri R. Carter, Executive Officer/Clerk
By [handwriting illegible] Deputy
K. Mason

Sixty years ago, in Brown v. Board of Education (1954) 347 U.S. 483, the United States Supreme Court held that public education facilities separated by race were inherently unequal, and that students subjected to such conditions were denied the equal protection of the laws under the 14th Amendment to the United States Constitution. In coming to its conclusion, the Court significantly noted:

> Today, education is perhaps the most important function of state and local

> governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful than any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a **right** which must be made available to all **on equal terms**. Id. at 493 (Emphasis added).

[SLIP OP. P. 2] In Serrano v. Priest (1971) 5 Cal. 3d 584 (hereinafter Serrano I) and Serrano v. Priest (1976) 18 Cal. 3d 728 (hereinafter Serrano II), the California Supreme Court held education to be a "fundamental interest" and found the then-existing school financing system to be a violation of the equal protection clause of the California Constitution, holding that:

> Under the strict standard applied in such (suspect classifications or fundamental interests) cases, the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the

> distinctions drawn by the law are *necessary* to further its purpose.
> Serrano II, at 761 (quoting Serrano I, at 597 (Original emphasis)).

In Butt v. State of California (1992) 4 Cal. 4th 668, the California Supreme Court held that a school district's six-week-premature closing of schools due to revenue shortfall deprived the affected students of their fundamental right to basic equality in public education, noting:

> It therefore appears well settled that the California Constitution makes public education uniquely a fundamental concern of the State and prohibits maintenance and operation of the public school system in a way which denies **basic educational equality** to the students of particular districts. The State itself bears the ultimate authority **and** responsibility to ensure that its district-based system of common schools provides **basic equality of educational opportunity**. Id. at 685 (Emphasis added).

What Brown, Serrano I and II, and Butt held was that unconstitutional laws and policies would not be permitted to compromise a student's fundamental right to equality of the educational experience. Proscribed were: 1) Brown: racially based segregation of schools; 2) Serrano I and II: funding disparity; and 3) Butt: school term length disparity. While these cases addressed the issue of a lack of **equality** of educational **opportunity** based on the discrete facts raised therein, here this Court is directly faced with issues that compel it to apply

these constitutional principles to the **quality** of the educational experience.

[SLIP OP. P. 3] Plaintiffs are nine California public school students who, through their respective *guardians ad litem*, challenge five statutes of the California Education Code, claiming said statutes violate the equal protection clause of the California Constitution. The allegedly offending statutes are: 44929.21(b) ("Permanent Employment Statute"); 44934, 44938(b)(1) and (2) and 44944 (collectively "Dismissal Statutes"); and 44955 ("Last-In-First Out (LIFO)"). Collectively, these statutes will be referred to as the "Challenged Statutes".

Plaintiffs claim that- the Challenged Statutes result in grossly ineffective teachers obtaining and retaining permanent employment, and that these teachers are disproportionately situated in schools serving predominately low-income and minority students. Plaintiffs' equal protection claims assert that the Challenged Statutes violate their fundamental rights to equality of education by adversely affecting the quality of the education they are afforded by the state.

This Court is asked to directly assess how the Challenged Statutes affect the educational experience. It must decide whether the Challenged Statutes cause the potential and/or unreasonable exposure of grossly ineffective teachers to all California students in general and to minority and/or low income students in particular, in violation of the equal protection clause of the California Constitution.

This Court finds that Plaintiffs have met their burden of proof on all issues presented.

[SLIP OP. P. 4]

PROCEDURAL HISTORY

This action was filed on May 14, 2012; on August 15, 2012, the currently operative First Amended Complaint for Declaratory and Injunctive Relief was filed against defendants 1) State of California; 2) Edmund G. Brown, Jr., in his official capacity as Governor of California; 3) Tom Torkalson, in his official capacity as State Superintendent of Public Instruction; 4) California Department of Education; 5) State Board of Education (1-5 hereinafter are collectively referred to as "State Defendants"); 6) Los Angeles Unified School District (LAUSD); 7) Oakland Unified School District (OUSD); and 8) Alum Rock Union School District (ARUSD).

On November 9, 2012, this Court, through written opinion, overruled demurrers filed by State Defendants and ARUSD. Thereupon, it indicated that controlling questions of law involving substantial grounds for difference of opinion existed and that appellate resolution may materially advance conclusion of litigation, pursuant to California Code of Civil Procedure 166.1, thus inviting appellate review of its rulings on the demurrers. On December 10, 2012, Defendants filed a petition for writ of mandate with the Court of Appeal, which issued a stay of all proceedings in this Court on December 18. On January 29, 2013, the Court of Appeal denied the relief requested by

Defendants, returning the matter to this Court for further proceedings.

On May 2, 2013, this Court, recognizing the legitimate and immediate interests in this litigation of the California Teachers Association and the California Federation of Teachers (collectively "Interveners"), granted their respective motions to intervene, thereby allowing them to become fully vested [SLIP OP. P. 5] parties herein and allowing the presentation of the **legal positions** of the widest-possible range of interested parties.

(This Court stresses **legal positions** intentionally. It is not unmindful of the current intense political debate over issues of education. However, its **duty and function** as dictated by the Constitution of the United States, the Constitution of the State of California and the Common Law, is to avoid considering the political aspects of the case and focus only on the legal ones. That this Court's decision will and should result in political discourse is beyond question but such consequence cannot and does not detract from its obligation to consider only the evidence and law in making its decision.

It is also not this Court's function to consider the wisdom of the Challenged Statutes. As the Supreme Court of California stated in In re Marriage Cases (2008) 43 Cal. 4th 757 at 780:

> It is also important to understand at the outset that our task in this proceeding is not to decide whether we believe, *as a matter of policy*, that the officially recognized relationship of a same-sex couple should -be

> designated a marriage rather than a domestic partnership (or some other term), but instead only to determine whether the difference in the official names of the relationships *violates the California Constitution*. (Original emphasis).

While judges of this country and state do not leave their personal opinions at the courthouse door every morning, it is incumbent upon them not to let such opinions color their view of the cases before them that day. The Supreme Court goes on:

> Whatever our views as individuals with regard to this question as a matter of policy, we recognize as judges and as a court our responsibility to limit our consideration of the question to a determination of the constitutional validity of the current legislative provisions.
> In re Marriage Cases, at 780.)

[SLIP OP. P. 6] Plaintiffs voluntarily dismissed with prejudice: 1) ARUSD on September 13, 2013; 2) LAUSD on September 18; and 3) OUSD on December 23.

On December 13, 2013, by written opinion, this Court denied State Defendants'/Interveners' motions for Summary Judgment/Summary Adjudication. Moving parties sought reversal of this ruling from the Court of Appeal through petition for writ of mandate/prohibition and request for stay of proceedings. This relief was summarily denied by the Court of Appeal on January 14, 2014, thus returning

the matter to this Court for further proceedings, including trial.

Trial commenced January 27, 2014. Motions for judgment pursuant to CCP 631.8 made by State Defendants/Intervenors after Plaintiffs rested were denied March 4. The trial concluded with oral argument on March 27 and with final written briefs filed on April 10, at which time the matter stood submitted to this Court for decision.

ANALYSIS

Since the Challenged Statutes are alleged to violate the California Constitution, the pertinent provisions thereof are set forth:

> Article 1, sec. 7(a): "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws ... ."
>
> Article 9, sec. 1: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific ... improvement."
>
> [SLIP OP. P. 7] Article 9, sec. 5: "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district ... ."

In Serrano I and II and Butt, *supra*, an overarching theme is paradigmatized: the Constitution of California is the ultimate guarantor of a meaningful, basically equal educational

opportunity being afforded to the students of this state.

State Defendants' exhibit 1005, "California Standards for the Teaching Profession" (CSTP)(2009) in its opening sentence declares: "A growing body of research confirms that the **quality of teaching** is what matters most for the students' development and learning in schools." (Emphasis added).

All sides to this litigation agree that competent teachers are a critical, if not the most important, component of **success** of a child's in-school educational experience. All sides also agree that grossly ineffective teachers substantially **undermine** the ability of that child to succeed in school.

Evidence has been elicited in this trial of the specific effect of] grossly ineffective teachers on students. The evidence is compelling. Indeed, it shocks the conscience. Based on a massive study, Dr. Chetty testified that a single year in a classroom with a grossly ineffective teacher costs students $1.4 million in lifetime earnings per classroom. Based on a 4 year study, Dr. Kane testified that students in LAUSD who are taught by a teacher in the bottom 5% of competence lose 9.54 months of learning in a single year compared to students with average teachers.

[SLIP OP. P. 8] There is also no dispute that there are a significant number of grossly ineffective teachers currently active in California classrooms. Dr. Berliner, an expert called by State Defendants, testified that 1-3% of teachers in California are

grossly ineffective. Given that the evidence showed roughly 275,000 active teachers in this state, the extrapolated number of grossly ineffective teachers ranges from 2,750 to 8,250. Considering the effect of grossly ineffective teachers on students, as indicated above, it therefore cannot be gainsaid that the number of grossly ineffective teachers has a direct, real, appreciable, and negative impact on a significant number of California students, now and well into the future for as long as said teachers hold their positions.

Within the framework of the issues presented, this Court must now determine what test is to be applied in its analysis. It finds that based on the criteria set in Serrano I and II and Butt, and on the evidence presented at trial, Plaintiffs have proven, by a preponderance of the evidence, that the Challenged Statutes impose a real and appreciable impact on students' fundamental right to equality of education **and** that they impose a disproportionate burden on poor and minority students. Therefore the Challenged Statutes will be examined with "strict scrutiny", and State Defendants/Intervenors must "bear[] the burden of establishing not only that [the State] has a *compelling* interest which justifies [the Challenged Statutes] but that the distinctions drawn by the law[s] are necessary to further [their] purpose." Serrano I, 5 Cal. 3d at 597 (Original emphasis).

PERMANENT EMPLOYMENT STATUTE

[SLIP OP. P. 9] The California "two year" statute is a misnomer to begin with. The evidence established that the decision not to reelect must be

formally communicated to the teacher on or before March 15 of the second year of the teacher's employment. This deadline already eliminates 2-3 months of the "two year" period. In order to meet the March 15 deadline, reelection recommendations must be placed before the appropriate deciding authority well in advance of March 15, so that in effect, the decision whether or not to reelect must be made even earlier. Bizarrely, the beneficial effects of the induction program for new teachers, which lasts an entire two school years and runs concurrently with the Permanent Employment Statute, cannot be evaluated before the time the reelection decision has to be made. Thus, a teacher reelected in March may not be recommended for credentialing after the close of the induction program in May, leaving the applicable district with a non-credentialed teacher with tenure. State Defendants' PMQ Linda Nichols testified that this would leave the district with a "real problem because now you are not a credentialed teacher; and therefore, you cannot teach." She further opined that State Superintendent of Education Tom Torlakson "clearly believes, you know it would theoretically be great" to have the tenure decision made after induction was over.

There was extensive evidence presented, including some from the defense, that, given this statutorily-mandated time frame, the Permanent Employment Statute does not provide nearly enough time for an informed decision to be made regarding the decision of tenure (critical for both students and teachers). As a result, teachers are being reelected who would not have been had more time been

provided for the process. Conversely, startling evidence was presented that in some districts, including LAUSD, the time constraint results in non-reelection based on "any doubt," thus [SLIP OP. P. 10] depriving 1) teachers of an adequate opportunity to establish their competence, and 2) students of potentially competent teachers. Brigitte Marshall, OUSD's Associate Superintendent for Human Resources, testified that these are "high stakes" decisions that must be "well-grounded and well founded."

This Court finds that **both** students and teachers are unfairly, unnecessarily, and for no legally cognizable reason (let alone a **compelling** one), disadvantaged by the current Permanent Employment Statute. Indeed, State Defendants' experts Rothstein and Berliner each agreed that 3-5 years would be a better time frame to make the tenure decision for the mutual benefit of students and teachers.

Evidence was admitted that nation-wide, 32 states have a three year period, and nine states have four or five. California is one of only five outlier states with a period of two years or less. Four states have no tenure system at all.

This Court finds that the burden required to be carried under the strict scrutiny test has not been met by State Defendants/Intervenors, and thus finds the Permanent Employment statute unconstitutional under the equal protection clause of the Constitution of California. This Court enjoins its enforcement.

DISMISSAL STATUTES

Plaintiffs allege that it is too time consuming and too expensive to go through the dismissal process as required by the Dismissal Statutes to rid [SLIP OP. P. 11] school districts of grossly ineffective teachers. The evidence presented was that such time and cost constraints cause districts in many cases to be very reluctant to even commence dismissal procedures.

The evidence this Court heard was that it could take anywhere from two to almost ten years and cost $50,000 to $450,000 or more to bring these cases to conclusion under the Dismissal Statutes, and that given these facts, grossly ineffective teachers are being left in the classroom because school officials do not wish to go through the time and expense to investigate and prosecute these cases. Indeed, defense witness Dr. Johnson testified that dismissals are "extremely rare" in California because administrators believe it to be "impossible" to dismiss a tenured teacher under the current system. Substantial evidence has been submitted to support this conclusion.

This state of affairs is particularly noteworthy in view of the admitted number of grossly ineffective teachers currently in the system across the state (2750-8250), and of the evidence that LAUSD alone had 350 grossly ineffective teachers it wished to dismiss at the time of trial regarding whom the dismissal process had not yet been initiated.

State Defendants/Intervenors raise the entirely legitimate issue of due process. However, given the evidence above stated, the Dismissal Statutes present the issue of *über* due process. Evidence was presented that classified employees,, fully endowed

with due process rights guaranteed under Skelly v. State, Personnel Board (1975) 15 Cal. 3d 194, had their discipline cases resolved with much less time and expense than those of teachers. Skelly holds that a position, such as that of a classified or certified employee of a school district, is a property right, and when such employee is [SLIP OP. P. 12] threatened with disciplinary action, due process attaches. However, that due process requires a balancing test under Skelly as discussed at pages 212-214 of the opinion. After this analysis, Skelly holds at page 215:

> [D]ue process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefore, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority imposing discipline.

Following the hearing of the administrative agency, of course, the employee has the right of a further multi-stage appellate review process by the independent courts of this state to assess whether the factual determinations are supported by substantial evidence.

The question then arises: does a school district classified employee have a lesser property interest in his/her continued employment than a teacher, a certified employee? To ask the question is to answer it. This Court heard no evidence that a classified employee's dismissal process (i.e., a Skelly hearing) violated due process. Why, then, the need for the

current tortuous process required by the Dismissal Statutes for teacher dismissals, which has been decried by both plaintiff and defense witnesses? This is particularly pertinent in light of evidence before the Court that teachers themselves do not want grossly ineffective colleagues in the classroom.

This Court is confident that the independent judiciary of this state is no less dedicated to the protection of reasonable due process rights of teachers than it is of protecting the rights of children to constitutionally mandated equal educational opportunities.

[SLIP OP. P. 13] State Defendants/Intervenors did not carry their burden that the procedures dictated by the Dismissal Statutes survive strict scrutiny. There is no question that teachers should be afforded reasonable due process when their dismissals are sought. However, based on the evidence before this Court, it finds the current system required by the Dismissal Statutes to be so complex, time consuming and expensive as to make an effective, efficient yet fair dismissal of a grossly ineffective teacher illusory.

This Court finds that the burden required to be carried under the strict scrutiny test has not been met by State Defendants/Intervenors, and thus finds the Dismissal Statutes unconstitutional under the equal protection clause of the Constitution of California. This Court enjoins their enforcement.

LIFO

This statute contains no exception or waiver based on teacher effectiveness. The last-hired

teacher is the statutorily-mandated first-fired one when lay-offs occur. No matter how gifted the junior teacher, and no matter how grossly ineffective the senior teacher, the junior gifted one, who all parties agree is creating a positive atmosphere for his/her students, is separated from them and a senior grossly ineffective one, who all parties agree is harming the students entrusted to her/him, is left in place. The result is classroom disruption on two fronts, a lose-lose situation. Contrast this to the junior/efficient teacher remaining and a senior/incompetent teacher being removed, a win-win situation, and the point is clear.

[SLIP OP. P. 14] Distilled to its basics, the State Defendants'/Interveners' position requires them to defend the proposition that the state has a compelling interest in the *de facto* separation of students from competent teachers, and a like interest in the *de facto* retention of incompetent ones. The logic of this position is unfathomable and therefore constitutionally unsupportable.

The difficulty in sustaining Defendants'/Interveners' position may explain the fact that, as with the Permanent Employment Statute, California's current statutory LIFO scheme is a distinct minority among other states that have addressed this issue. 20 states provide that seniority **may** be considered among other factors; 19 (including District of Columbia) leave the layoff criteria to district discretion; two states provide that seniority cannot be considered, and only 10 states, including California, provide that seniority is the sole factor, or one that must be considered.

This Court finds that the burden required to be carried under the strict scrutiny test has not been met by State Defendants/Intervenors, and thus finds the LIFO statute unconstitutional under the equal protection clause of the Constitution of California. This Court enjoins its enforcement.

EFFECT ON LOW INCOME / MINORITY STUDENTS

Substantial evidence presented makes it clear to this Court that the Challenged Statutes disproportionately affect poor and/or minority students. As set forth in Exhibit 289, "Evaluating Progress Toward Equitable Distribution of Effective Educators," California Department of Education, July 2007:

> [SLIP OP. P. 15] Unfortunately, the most vulnerable students, those attending high-poverty, low-performing schools, are far more likely than their wealthier peers to attend schools having a disproportionate number of underqualified, inexperienced, out-of-field, and ineffective teachers and administrators. Because minority children disproportionately attend such schools, minority students bear the brunt of staffing inequalities.

The evidence was also clear that the churning (aka "Dance of the Lemons") of teachers caused by the lack of effective dismissal statutes and LIFO affect high-poverty and minority students disproportionately. This in turn, greatly affects the stability of the learning process to the detriment of such students.

Alexander Hamilton wrote in Federalist Paper 78: "For I agree there is no liberty, if the power of judging be not separated from the legislative and executive powers." Under California's separation of powers framework, it is not the function of this Court to dictate or even to advise the legislature as to how to replace the Challenged Statutes. All this Court may do is apply constitutional principles of law to the Challenged Statutes as it has done here, and trust the legislature to fulfill its mandated duty to enact legislation on the issues herein discussed that passes constitutional muster, thus providing each child in this state with a basically equal opportunity to achieve a quality education.

[SLIP OP. P. 16] It is therefore the Judgment of this Court that all Challenged Statutes are unconstitutional for the reasons set forth hereinabove. All injunctions issued are ordered stayed pending appellate review.

Dated this 27th day of August, 2014

/s/ J. Treu

Treu, J.